

HUMAN SERVICES BOARD

INTRODUCTION

Procedural history

¹ This case arose prior to the 2007 amendments to 33 V.S.A. §§ 4912 *et seq* that imposed time limitations upon individuals disputing Department substantiations of abuse.

Status conferences were held on February 22, 2007, April 19, 2007, and December 12, 2007. Due to scheduling difficulties, the case was first set for hearing on September 6, 2007. The Department moved to continue the hearing. The petitioner did not object and the hearing was rescheduled for December 14, 2007. Due to bad weather, petitioner was unable to travel from out of state to Vermont and the case was rescheduled to January 14, 2008.²

Both parties submitted pre-trial motions in December 2007. On or about December 4, 2007, petitioner filed Motions in Limine regarding several witnesses on the Department's November 13, 2007 witness list and regarding prior bad acts. During the April 19, 2007 status conference, the Department stated that they intended to call R.B. as a witness and perhaps the two other individuals present on August 30, 2002 or the investigator. The Department's November 13, 2007 list included eleven names including many with no first hand knowledge of the incident. In addition, the Department provided affidavits signed in 2005 regarding two incidents (one in 2000 and the other in 2001) regarding behavior that at worst was sexual harassment to demonstrate that sexual assault was part of petitioner's character.

² Petitioner moved out of state in 2003.

Prior to the hearing, the parties were notified that the motions were taken under advisement but that testimony of prior bad acts or testimony from those without first hand knowledge of the incident would not be heard. These motions are denied pursuant to Vermont Rules of Evidence (VRE) 403 and 404(b). VRE 404(b) excludes most character evidence because of its prejudicial effect. The proffered testimony did not address what happened between the petitioner and R.B. on August 30, 2002. As such, the proffered testimony is not relevant.

The Department filed a Motion in Limine on or about December 10, 2007 requesting that R.B., B.L., and K.R. be allowed to testify outside the presence of petitioner. All three witnesses are adults. The Board has allowed this type of motion when a witness is a minor or there is compelling documentation from a therapist about the negative impact upon the witness from testifying in the presence of a petitioner. The Department did not provide such documentation. The Department's Motion was denied on December 12, 2007.

The following recommendation is based on the evidence adduced at hearing and subsequent briefs.

FINDINGS OF FACT

1. Sexual contact between the petitioner and R.B. occurred on August 30, 2002 at the petitioner's home. B.L. and A.D. were in petitioner's home at the time of the incident. All four individuals were high school students at that time; petitioner and R.B. were minors.

2. R.B. notified her principal about the incident approximately two weeks later. Her principal contacted the Chittenden Unit for Special Investigations (CUSI).

3. The case was assigned to M.H. (Trooper H.) who was a Colchester police officer assigned to CUSI; he conducted an investigation including interviews and sworn statements from R.B., the petitioner, B.L., and A.D. M.H. is now a state police trooper. Trooper H. received special training to interview sexual assault victims and perpetrators. Trooper H. was assigned to CUSI for two years one month. During his assignment, Trooper H. was the lead investigator on 125 cases. Trooper H. testified that the others' statements did not corroborate R.B.'s account completely. Trooper H. found R.B. credible and referred the case for prosecution.³

4. Petitioner and A.D. were hanging out on August 30, 2002. Petitioner and A.D. attended the same high school;

³The State's Attorney's office declined prosecution. Because the burden of proof is higher in criminal cases, a negative inference cannot be drawn from declining prosecution.

they were and are still friends. They went to Church Street in Burlington and ran into R.B. during the latter part of the afternoon. R.B. had previously attended petitioner's high school. The three had known each other for approximately two years and were friendly.

5. Petitioner offered R.B. a ride. They went to B.L.'s home and picked her up. B.L. went to the same high school as the petitioner and A.D. B.L. was friends with the other three.

6. Approximately two hours prior to the incident, R.B. had snorted oxycotin. She shared a ten milligram dose with a friend or had approximately 5 milligrams. R.B. testified that the oxycotin had low impact on her and did not cloud her judgment. Trooper H. corroborated that the dosage was low and would not incapacitate a person's judgment. The evidence does not support a finding that R.B. lacked capacity to consent.

7. All four went to petitioner's house. They went to the living room which was on the first floor and put on the television. In terms of the house's layout, petitioner's bedroom was located above the living room; the bathroom was directly across from petitioner's bedroom. The staircase

leading to the second floor was approximately five feet from the living room.

8. R.B. stepped outside for a cigarette and was joined by the petitioner. Both R.B. and petitioner came back into the house. The details of how R.B. and petitioner went upstairs and whether the sexual contact was consensual are in dispute and will be addressed below. Petitioner did perform oral sex on R.B. Petitioner then put on a condom and had intercourse with R.B.

9. The petitioner and R.B. were upstairs for twenty to thirty minutes. During that time, B.L. and A.D. remained downstairs.

R.B. and petitioner go upstairs

10. R.B. testified that when she came inside with petitioner after her cigarette that petitioner started pushing her up the stairs. She said she thought it was a joke and called to B.L. She testified that B.L. jumped on petitioner. Neither B.L. nor anyone else corroborated this statement.

11. The petitioner testified that R.B. brought up having sex while they were outside smoking. When R.B. returned to the house, petitioner testified that he followed her up the stairs.

12. B.L. was granted use immunity to testify at the fair hearing.

When B.L. met with Trooper H. on October 2, 2002, she gave a sworn statement comprised of the following information. B.L. was watching television with A.D. when R.B. went up the stairs to the second floor. The petitioner went up the stairs next. R.B. and the petitioner did not fool around on the steps.

At the hearing, B.L. testified to different information. B.L. testified that petitioner was horsing around and pulling R.B.'s pants down on the stairs. [R.B. testified that petitioner did not try to pull her pants down.] Then, according to B.L., R.B. went up the stairs first and petitioner followed.

When questioned about discrepancies between her 2002 statement and her 2008 testimony, B.L. testified that she had a "small memory" and that she had blocked out what happened.

Trooper H. testified that he found B.L.'s 2002 statement credible.

Where there are discrepancies between B.L.'s 2002 statement and 2008 testimony, the hearing officer finds B.L.'s 2002 statement to Trooper H. more credible.

13. A.D. gave a statement to Trooper H. on October 24, 2002. In that deposition, he stated he did not have a clear memory of the day of the incident. A.D. was offered use immunity which he declined. On December 11, 2007, A.D. left a rambling message for the Department's attorney that he had been on drugs at the time, did not remember, and had lied to petitioner's attorney. Later that same day, A.D. had a telephone conversation with petitioner. A.D. was called as a witness by petitioner. At the hearing, A.D. testified that it was hard to remember and that he was on drugs the day of the incident. He stated he did not want to hurt petitioner's case.

Based on A.D.'s admissions regarding drug usage and memory problems, his testimony regarding the particulars of the incident is unreliable and will not be used to support these findings.

14. Based on the above evidence (10-13), the credible evidence is that R.B. and petitioner came into the house after smoking. R.B. went up the stairs; petitioner followed her.

On the second floor

15. R.B. testified that she went first into the bathroom. She testified that she called to B.L., but B.L.

did not come up. R.B. does not know whether B.L. heard her. R.B. did not call out again.

Petitioner testified that R.B. did not yell for B.L.

B.L. told Trooper H. that she did not hear any cries for help from R.B. At the hearing, B.L. stated she heard R.B. scream. B.L. testified at the hearing that she did nothing when she heard screaming; she did not discuss the scream with A.D. B.L. testified that she did not think she could do anything and that she first disclosed this information one month before the hearing or approximately five years after the incident. We find B.L.'s 2002 statement to Trooper H. more credible.

16. R.B. testified that the petitioner moved her from the bathroom to his bedroom. She stated she sat on the bed and stated she thought she could reason with petitioner. R.B. testified that she brought up to petitioner that they were both involved with other people. R.B. testified that she did say no to sex but she was not sure that she made it clear she did not want to have sex. She remembered intercourse but not oral sex.

R.B.'s testimony differed in some points from the information she provided Trooper H. She testified that her statements to Trooper H. were true and that her memory about

the incident was better in 2002. R.B. told Trooper H. that there was both oral sex and intercourse.

17. Trooper H. confirmed at hearing information from his report and R.B.'s sworn statement that petitioner started taking off his clothes in the bathroom and R.B. thought petitioner was being a jerk. R.B. stated to Trooper H. that her opinion changed when petitioner grabbed her hand, pulled her in front of him into his bedroom. Trooper H. asked R.B. whether she felt free to leave, and R.B. stated:

I suppose I was. I definitely was free to leave. I guess I was just scared. He was a friend of mine you know. I wasn't afraid of him and I had no reason to be and he was someone I thought I could talk to and when he pushed me that first thing I said [petitioner] we can't do this.

18. The petitioner testified that they started to kiss while in the bathroom and he invited R.B. into his bedroom. Petitioner testified that R.B. did not say no and did not yell for help. The petitioner testified that he performed oral sex, put on a condom, and had intercourse with R.B. He testified that he believed that R.B. consented to sex. Petitioner testified that he had qualms about having sex with R.B. because he wanted to be faithful to his girlfriend although he admitted he had not been faithful in the past. The remainder of the day

19. After the petitioner and R.B. came downstairs, the petitioner left to visit his girlfriend; petitioner had informed the others earlier that he planned a short visit to his girlfriend when she finished work. It was petitioner's practice to visit his girlfriend for about twenty minutes when she finished her job. The petitioner left around 6:30 p.m. and was gone approximately thirty to forty minutes.

20. R.B. testified that after petitioner left to visit his girlfriend, she told B.L. she had sex with petitioner but that she had not wanted to have sex. R.B. did not leave petitioner's home after the incident upstairs while petitioner was gone.

21. B.L. told Trooper H. that R.B. did not tell her she had sex with petitioner until a day or two later. B.L. told Trooper H. that R.B. did not do anything against her will. B.L. testified at the hearing that R.B. told her that afternoon that she had sex with petitioner but did not want to. The hearing officer finds B.L.' 2002 statement to Trooper H. more credible than her testimony at hearing to the extent it conflicts.

22. When the petitioner returned from visiting his girlfriend, all four spent several more hours together.

There is conflicting evidence whether they went to R.B.'s home on the Islands before going to downtown Burlington.

Other testimony

23. The Department offered testimony from K.R. who attended high school with the petitioner and who knew the others. K.R. testified that she was walking through the main school lobby and up the staircase when she passed petitioner, A.D., and B.L.; other students were also in transit. She stated that she overheard petitioner say that he got into R.B.'s pants and that she did not want to. K.R. did not recall speaking to Trooper H. at the end of October 2002 about a message she gave B.L. from petitioner.⁴ She did not give this information in 2002. Neither B.L. nor A.D. corroborated her information. K.R. spoke with R.B.'s father prior to her testimony. This information five years after the incident is suspect.

24. Petitioner spoke with Trooper H. Trooper H. contacted petitioner after B.L. contacted him about threatening statements. Trooper H. gave petitioner the opportunity to speak to him; he was surprised when petitioner

⁴When petitioner's girlfriend learned he had sex with R.B., petitioner sent a message through K.R. to B.L. that he did not want to see her off school grounds on or about October 23, 2002 because he was angry about his girlfriend finding out what happened. B.L. testified she spoke to petitioner's girlfriend about what happened. The warning was made several weeks after B.L. had given her statement to Trooper H.

elected to talk to him about the incident. Trooper H. testified that petitioner initially told him that he did not have sex with R.B. Trooper H. told petitioner that he knew this was not true. Petitioner then told Trooper H. that he had consensual sex with R.B. According to Trooper H., the petitioner stated that he was "a ladies man" and that girls were after him. Trooper H. testified that petitioner was concerned about his girlfriend knowing what happened.

ORDER

The Department's decision to substantiate abuse is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

Petitioner sought a fair hearing prior to the operative date of September 1, 2007 for the amendments to Chapter 49 of Title 33. The statute in place at the time this case arose, 33 V.S.A. § 4916(h), provides:

A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not

substantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the Commissioner to establish that the record shall not be expunged.

The pertinent sections of 33 V.S.A. § 4912 define abuse and sexual abuse as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

(8) "sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy or any lewd and lascivious conduct involving a child. . .

There is no question that sexual contact occurred, the question is whether Department can show by a preponderance of evidence that the sexual contact rose to the level of sexual abuse.

In Vermont's criminal statutes, the term "sexual assault" has superseded "rape". The pertinent sections of 13 V.S.A. § 3252 states:

(a) No person shall engage in a sexual act with another person and compel the other person to participate in a sexual act:

(1) without the consent of the other person; or

(2) by threatening or coercing the other person; or

(3) by placing the other person in fear that any person will suffer imminent bodily injury.

(b) No person shall engage in a sexual act with another person and impair substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person.

(c) No person shall engage in a sexual act with a child who is under the age of 16. . .

Consent is defined at 13 V.S.A. § 3251(3) as "words or actions by a person indicating a voluntary agreement in a sexual act."

On August 30, 2002, both the petitioner and R.B. were old enough to consent to sex although both were legally minors. The evidence does not point to petitioner threatening or coercing R.B. or petitioner placing R.B. in fear of bodily injury.

The key issue is consent. The Department has been adamant that R.B.'s use of oxycotin did not impair judgment. R.B. retained the ability to give consent.

Weighing the evidence has been difficult. Individuals testified five years after the event. In a number of instances, testimony differed from sworn statements given in 2002 during Trooper H.'s investigations. All concurred that their memory was better in 2002.

Certain testimony was inherently unreliable. In particular, A.D.'s admissions about his memory and drug use as well as his bias made any statements about what happened on August 30, 2002 unreliable. B.L. remembering one month before hearing that R.B. yelled or screamed is suspect after so many years. The same can be said about K.R. who testified to a five year old overheard conversation while going through the halls with other students and who confirmed speaking with R.B.'s father prior to the hearing.

In many respects this case comes down to the testimony and actions of R.B. and petitioner. R.B. has given testimony in which she stated she is not sure whether she communicated to petitioner she did not want sex. When petitioner left to visit his girlfriend, R.B. remained at petitioner's home. After petitioner returned, R.B. spent several more hours hanging out with petitioner, B.L., and A.D. The Department did not provide any testimony why R.B.'s subsequent actions were consistent with sexual abuse. On the other hand, petitioner (although not initially honest with Trooper H. or faithful to his girlfriend) consistently maintained that R.B. consented to sex.

The Department has not sustained their burden of proof. As a result, the petitioner's record is expunged from the

child abuse registry. 3 V.S.A. § 3091(d), Fair Hearing Rule
No. 17.

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